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CREDIT CORP. (M) BHD.

v.

K.M. BASHEER AHAMED K.M. MAGHDOOM MOHIDEEN & ANOR.

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FEDERAL COURT, KUALA LUMPUR
 ABDUL HAMID OMAR CJ (MALAYA)
 MOHD. AZMI FJ
 SYED AGIL BARAKBAH FJ
 [CIVIL APPEAL NO. 259 OF 1982]
 28 SEPTEMBER 1984

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HIRE PURCHASE: *Leasing - Photostat copier machine leased under lease agreement - Defects in machine - Respondents stopped payments of installments - Appellant repossessed machine - Claimed whole amount of monthly rentals and other charges - Duty of appellant to protect respondents' interest as against supplier's.*

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The appellant, a finance company, leased a photostat copier machine under a lease agreement to the respondents. The respondents suffered business losses occasioned by defects in the machine and as a result of this stopped payments of the monthly installments. The appellant repossessed the machine and claimed the whole amount of the monthly rentals unpaid as per schedule to the lease agreement, storage and custody charges. The High Court upheld the decision of the President of the Sessions Court and confirmed that the appellant was not entitled to the full total rentals under the lease agreement, but was only entitled to the two months' arrears of rentals. The appellant appealed.

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Held:

[1] The lease should have incorporated a clause to safeguard the interest of the respondents against the supplier in case of any breach of warranty or condition as to quality or fitness of the machine.

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[2] Notwithstanding the absence of such a clause the appellant had a duty to seek remedy against the supplier as the machine was seriously defective and not functioning properly.

[3] In the circumstances, the respondents were not obliged to continue paying the total rentals as per the schedule.

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[4] The respondents' liability to continue paying the rentals notwithstanding the occurrence of any defect in the machine as per Clause 9 of the lease should be construed as to refer to any defect caused by the act or negligence on the part of the respondents, their servants or agents.

[5] The appellant had committed a breach of the lease in failing to dispose of the machine by means of a *bona fide* sale.

[Appeal dismissed with costs. Decision of learned Judge confirmed]

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Legislation referred to:

Sale of Goods (Malay States) Ordinance 1957, ss. 15, 16, 59

Other source referred to:

Leasing, T.M. Clark, pp. 72, 83, 84

For the appellant - K. Anantham; M/s Skrine & Co.

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For the respondents - D.P. Vijandran; M/s D.P. Vijandran Associates

JUDGMENT

Syed Agil Barakbah FJ:

This appeal relates to a lease agreement of a Toko Plain photostat copier machine executed between a finance company, Credit Corporation (Malaysia) Berhad (the appellant), and the managing partner of Selangor Book Centre (the first respondent) on 4 April 1979. At the request of the respondents, the appellant purchased the machine and leased it to them for a term of 36 months for the total rental of RM13,623.84 payable in the sum of RM378.44 per month w.e.f. 4 April 1979 and thereafter on the 4th of each succeeding month till 3 March 1982. At the expiration or sooner determination of the lease, the appellant as the owner was entitled to take back the machine and dispose of it. Two days after installation in the respondents' premises, the machine broke down. It became defective thereafter in spite of constant servicing, repairs and replacements of parts by the supplier, Laijin Corporation Sdn. Bhd., at the request of the respondents and with the knowledge of the appellant. (See pp. 62 to 80 inclusive of the appeal record). As a result, the respondents' business was adversely affected resulting in losses. The respondents stopped paying the monthly installments. The appellant exercising its right under Clause 5 of the agreement took the machine into custody on 1 October 1979 and issued a custody notice as required on 2 October 1979, claiming the whole amount of rent still unpaid, storage and custody charges and costs, etc. (See p. 54 of record). Thirty days thereafter, on the failure of the respondents to pay the said amount and obtain re-delivery of the machine, the appellant sent another notice dated 2 November 1979 treating the respondents' action as repudiation of the lease agreement and refusal to be bound further by it. (See p. 55 of record).

The appellant's claim as plaintiff in the Sessions Court Kuala Lumpur, *inter alia*, for the total rental specified in the schedule to the agreement (see p. 47 of the record) less that already paid was scaled down by the learned President who heard the case, to two months' arrears of rental amounting to RM756.88 with interest thereon at the rate of 16% per annum from 29 July 1980 up to the date of realisation. Being dissatisfied with the said decision, they appealed to the High Court against it.

The only issue for determination by the learned Judge was whether the appellant was entitled to the whole of the rentals as stipulated in Clause 8 of the lease agreement. He agreed with the learned President, dismissed the appeal and confirmed the judgment of the Court below. Hence the present appeal to us on the same issue. Having gone through the record and after hearing the submissions of the learned Counsel, we agree with respect with the decision of the learned Judge. We would first quote what he said in his judgment:

The machine was leased to respondent on 4 April 1979. The appellant repossessed it on 1 October 1979. The machine was subsequently sold to a motor company in Malacca (p. 19 of Appeal Record).

The learned President found that the respondent was in breach of Clause 4 of the Agreement (relating to payments) (see p. 22 of Appeal Record). But the learned President also found that the appellant was in breach of Clause 8 of the Agreement (conceded throughout the proceeding) in that the machine was not sold by public auction nor sold to a trader "dealing in goods of similar description". Because of this the learned President disallowed the recovery of all rentals in the schedule and allowed only recovery on the unpaid rentals for two months.

In my view the learned President's award could also be supported by the circumstances of the breach of Clause 4. The breach was preceded by a written complaint on the defectiveness of the machine made by the respondent on 30 August 1979 (see p. 17 of Appeal Record). Secondly, there was also evidence that the respondent had long wanted to surrender the machine because of poor service (see p. 18 of Appeal Record). Finally, it was also in evidence that

a the machine broke down two days after installation and the constant breakdown adversely affected the business of the respondent. Apparently after some telephone conversations between the respondent and the appellant the machine was taken away on 1 October 1979. By then four months' rental had been paid. The rentals unpaid prior to repossession were rentals for the months of August and September 1979.

b Thus on the evidence it was never seriously disputed that the machine was defective. It was also in evidence that the surrender of the machine was initiated by the respondent himself. In my opinion the appellant should not be allowed to rely on Clause 9 of the Agreement which seems to be clearly one-sided in terms and unconscionable in effect.

It is apparent that the Judge based his conclusion on the undisputed facts and circumstances of the case which, in his view, rendered it unjustifiable to allow the appellant to rely on Clause 9. He has, however, not given his reasons on the law. Before we do so, we feel it appropriate to reproduce three of the clauses in the agreement relevant to the issue:

c 4. I further agree: (a) to make all payments to your office to which this offer is addressed or such other place as you may direct in writing and any payments otherwise made shall constitute the person receiving the same my agent; (b) to pay interest at the rate of 16% per annum on any moneys payable hereunder which may from time to time overdue; (c) to pay you any expenses you may incur by reason of your retaking or attempting to retake possession of the goods; (d) to repay to you on demand any moneys which you may think fit to pay to make good any failure by me to comply with any obligations hereunder or any other obligation incurred by me in respect of the goods and any other expense you may incur in the enforcement or protection of your rights hereunder or in the goods including (among other things) moneys paid by you in releasing any lien claimed over the goods in dismantling and removing the goods from any premises and in any repair or renovation to any such premises ...

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e 8. In the event of your acceptance of any repudiation of the lease by me (whether such repudiation occurs as provided in Clause 5 hereof or otherwise) my liability to you for the payment of the total rent specified in the Schedule hereof and for any other moneys then payable to you under the terms and conditions of this lease agreement shall not be affected and I shall pay upon demand a further sum equal to the amount (if any) by which the amount of the residual value of the goods as stated in the Schedule hereto exceeds the amount of the nett proceeds of sale of the goods upon a *bona fide* sale by you of the goods at public auction without reserve or to or through a trader dealing in goods at public auction without reserve or to or through a trader dealing in goods of a similar description. Such sum shall bear interest at the rate of Sixteen Dollars (RM16) per centum per annum from the date of demand until payment. Upon payment to you of that sum and interest thereon together with the unpaid rent and other moneys as aforesaid I shall be relieved of all liability to you for rent or other moneys under the agreement and damages for breach of my agreement with you.

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g 9. I warrant that before signing this offer I have examined the goods and have satisfied myself as to their condition and their suitability for my purposes and I agree that no warranty condition description or representation on your part is given and any express or implied warranty or condition as to the quality fitness safety or road worthiness or otherwise of the goods prior to or at any time during the continuance of the lease is hereby excluded and my obligations to pay rent and otherwise hereunder shall continue notwithstanding the occurrence of any defect or breakdown in the goods.

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i We are dealing with a lease of personal property as opposed to real property and on which there has been no attempt to enact legislation to regulate the leasing thereof as in the case of real property by the National Land Code. It is classified in English law as a type of bailment and is subject to the rules of common law. It is distinguished from hire-purchase agreements

which are under statutory provisions. (Hire Purchase Act 1967). Unlike a lease, a hire-purchase agreement includes an option to purchase and possesses elements of sale. It is not a contract of bailment pure and simple. The dividing line between a hire-purchase and financial lease is whether or not the lessee may become the owner of the leased equipment. (See *Leasing* by T.M. Clark).

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A lease is defined as a contract between a lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such assets by the lessee. The lessor retains ownership of the asset. The lessee has possession and use of the asset on payment of specified rentals over a period. A lease may be specified as a financial lease or an operating lease. Judging from the terms and conditions in the light of the main characteristics, the present case is a financial lease.

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At common law, it is usual to exclude the lessor from contractual liability arising from the implied terms as to fitness and quality. This is because the equipment is selected from the manufacturer or distributor by the lessee who requests the lessor to buy it and then lease it to him. The lessee takes on the responsibility of checking the condition of the equipment at the time of delivery and normally accepts it on the lessor's behalf. The lessor gives no warranty to the lessee as to the fitness of the equipment, but where there is no direct contractual arrangement between the lessee and the supplier, there is normally provision in the lease for action to be taken by the lessor on the lessee's behalf against the supplier. (See *Leasing* by T.M. Clark, pp. 72, 83 & 84). This is required because since the lessor is the buyer and the legal owner of the goods, he has privity of contract with the manufacturer or supplier. Under the Sale of Goods (Malay States) Ordinance (No. 1 of 1957), there is an implied warranty or condition as to quality and fitness of goods supplied under certain contracts of sale. There is also an implied condition that the goods shall correspond with the description. (See ss. 15 and 16). In case of any breach of warranty, s. 59 provides remedy to the appellant as the buyer not only to reject the goods but also to set up the breach by diminishing or extinguishing the price or sue the seller for damages for breach.

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In the present lease, as between the respondents and the appellant, no warranty or condition as to quality or fitness of the machine is given by the latter who is also excluded by Clause 9 from contractual liability in case of any defect or breakdown. There is, however, no clause to safeguard the interest of the respondents against the supplier in case of any breach of warranty or condition as explained earlier. In our considered judgment, the clause should have been included in the lease requiring the appellant to take necessary action on behalf of the respondents.

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Even without its inclusion, we are of the view the appellant ought to seek a remedy against the supplier of the machine. According to the facts, it cannot be disputed that the machine was seriously defective and not functioning properly in spite of unsuccessful attempts to remedy it by repairs and change of spare parts. The defect started two days after its delivery, and the circumstances clearly indicate the defect was latent and not patent or such as may be discovered by ordinary vigilance on the part of a purchaser. There was therefore more than sufficient ground for the appellant to have taken action against the supplier for damages. In the circumstances, the respondents were not obliged under Clause 9 to continue paying the total rental specified in the schedule. The respondents' liability as stated in the last limb of the clause should be construed as to refer to any defect or breakdown caused by any act or negligence on the part of the respondents, their servants or agents and not for any defect

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a for which the manufacturer or supplier is responsible. Similarly, the warranty by the respondents as to the satisfactory condition and suitability of the machine refers to its condition as is discovered by ordinary vigilance on examination but does not extend to any concealed or latent defect. The above, in our view, is consonant with the real intention of the parties in the light of the facts and circumstances of the case.

b It was also conceded that the appellant had committed a breach of Clause 8 in failing to dispose of the machine by means of a *bona fide* sale according to the stipulation therein. It was sold to a motorcar firm in Melaka. The appellant explained the difficulty in getting a *bona fide* buyer. We do not think it was an impossibility but it might require extra effort and time. That, in our view, is not a reasonable excuse for contravening the agreement. The appellant has no doubt abandoned its claim under this clause, but it does not dispel the fact that it has committed a breach.

c For the above reasons, we confirm the decision of the learned Judge and dismiss the appeal with costs. The deposit is to be paid to the respondents on account of costs.

Also found at [1985] 2 CLJ 351

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